UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT BERGERON, individually and on behalf of all others similarly situated,

Plaintiff,

Case No. 20-cv-00875

-vs-

GRINDR, INC.,

Defendant.

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United States Courthouse
White Plains, New York

March 23, 2021
10:02 a.m.

** VIA TELECONFERENCE **

B e f o r e:

HONORABLE KENNETH M. KARAS

District Judge

A P P E A R A N C E S:

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THE CLERK: This is 20-cv-875 Bergeron v. Grindr, Inc.

Counsel for plaintiff, please state your appearance for the record.

MR. SHEEHAN: For the plaintiff, Spencer Sheehan, Sheehan & Associates, P.C. Good morning, Your Honor.

THE COURT: Good morning.

THE DEPUTY CLERK: Counsel for defendant?

MR. SIACHOS: Good morning, Your Honor. Peter Siachos with Gordon Rees on behalf of defendant, Grindr.

THE COURT: All right. Good morning.

All right. So we are gathered here telephonically for argument on defense motion to compel arbitration, or in the alternative, to dismiss. I have had plenty of opportunity to read the papers, so I thank you for that. So it's the defense's motion. The digital floor is yours.

MR. SIACHOS: Thank you, Your Honor. I appreciate it.

Your Honor, I first want to focus on the motion to compel arbitration because I think it's fairly straightforward. Your Honor has read the papers, but what I want to make sure that is evident from the papers is just how conspicuous and emphasized this arbitration clause is when a user signs up to become a Grindr member.

Whether they are on the app or online, the first thing that they see is -- on the very first page is an all bold, all caps, the admonition that Section 21 of the agreement contains

an arbitration clause, and it's written in plain English, the very first page of the terms and conditions. Now that's -- Your Honor, you've heard a lot of these motions. I've argued a lot of these motions. I've got to say, this is the first time that I have actually seen it where on the first page, the very first thing you see in different writing, in emphasized writing is an admonition that there is an arbitration clause; and not only is there an admonition or a caveat there is an arbitration clause there, it has the section where it appears, Section 21, is hyperlinked so if the user has a concern with that, if the user wants to read it, it's so easy for them to find it. It's not like it's buried deep on page 23. It's on the first page. And when they click on that hyperlink, it takes them to the arbitration clause.

The arbitration clause itself, Your Honor, is as mandatory as an arbitration clause can get. It contains all the magic words: Must, shall, and whatnot that the user will participate in arbitration. So if we were in the olden days, which Your Honor and I are old enough to remember probably, before phones and, you know, all of these electronic arbitration clauses, if we were in the olden days --

THE COURT: Wait, wait, wait. Hold on. How old do you think I am? Before phones?

MR. SIACHOS: Before iPhones, Your Honor.

THE COURT: Okay. All right.

MR. SIACHOS: I am a little -- I am a little older than most of the people on this call, so I like to make jokes about that, but before iPhones and before the apps and before clicking on the checkmarks, you know, even if we were to look at this in the olden days -- and I am aging myself here, Your Honor -- this would be highly enforceable.

But we get to -- fast forward to what, 2007, 2008, iPhones come around, early 2010s, teens, Grindr and other apps come about, and then we have something called clickwrap arbitration or clickwrap terms and conditions, clickwrap arbitration agreements. And under Second Circuit law, unless Your Honor wants to change that law, which it's very, very established, these sort of arbitration clauses are routinely enforced. These sort of terms and conditions are routinely enforced. So when the user gets on Grindr, as Your Honor could see from the flow of the screen shots from the app, again, first thing they see, arbitration clause. Click on it. You can read the arbitration clause, and then electronically these are enforced routinely throughout the country, and especially in the Second Circuit.

So -- and another thing, Your Honor, is it's not like they have to click around to see this. They can just scroll through the actual terms and conditions as they appear on the page and then "proceed" is in bright orange. The next step is, even after you click "proceed," it asks you: Are you sure you

want to proceed? Do you really accept these terms and conditions? Do you really accept Grindr's arbitration clause? And the answer is that they do, and this class representative did. It's undisputed they did. They don't deny that they accepted the arbitration clause.

Now, some of the arguments they make in opposition to it is, well, they didn't have time to read all of this, and it's really terrible what Grindr did selling, you know, their HIV status and what may be in their chats and whatnot, but that's not what -- that doesn't -- it's not dispositive at all of this motion. It doesn't matter what Grindr may have done later as to whether the arbitration clause is enforceable or not. If they don't like what Grindr did, then go to arbitration and deal with it and make a claim; but the argument that sort of surprised me in their opposition was that the arbitration clause shouldn't be enforced because what Grindr did is so terrible, and they wronged the plaintiff and thereby wronged the class.

Speaking of class though, Your Honor, there is also a class action waiver right next to the arbitration clause; not that we necessarily need it because, as the Supreme Court said, class actions can't proceed in arbitration. But lest there be any doubt, we have an arbitration clause. We have a mandatory arbitration clause. We have a clickwrap that's routinely enforced in the Second Circuit. We have something that's very clear here, and we have a class action waiver.

So the arbitration clause should be enforced.

There is one more case, Your Honor, that has -- that I found last night that has been decided since our briefing occurred, and if Your Honor would like, I could file a notice of supplemental authority, but just if Your Honor would like to take a gander at it, it's your colleague in the Second Circuit, Judge Katherine Polk Failla, I believe that's how you pronounce her name.

THE COURT: Failla, Judge Failla.

MR. SIACHOS: Yeah. And the case is *Jampol*, J-A-M-P-O-L, *versus Blink Holdings*, and that's 20-cv-2760. The Westlaw cite is 2020 Westlaw 7774400. That's a December 30th, 2020 decision; and in that case, it's very similar. It's a clickwrap case. Judge Failla, she compelled arbitration in that case, and it's really interesting because of this: In that case, the user went to a kiosk at a gym. One of those like, you know, like you see at the airport when you check in, a kiosk with a touch screen; and the arbitration clause was not only far less conspicuous in that case, which is evident from the complaint and the case and everything, but the arbitration clause didn't even -- didn't even apply to the agreement at issue, and Judge Failla found that that arbitration clause still applied. She still compelled arbitration.

So we have a case, a very recent case, with another clickwrap sort of arbitration clause not as conspicuous as this

one where it was in a kiosk where somebody was at a gym trying to sign up. Certainly, they didn't have much time to read it there, certainly not as much time as they would sitting at their home in the comfort of their home with their iPhone, and clicked on it, and the court found that it was enforceable.

Notably, one more thing I wanted to add, Your Honor, about this arbitration clause was that the word "arbitration" is mentioned on nine different pages of this 30-page terms and conditions. It's mentioned several times on the first page. It's mentioned 34 times total in the agreement. It's very difficult for the plaintiff to argue that this wasn't conspicuous enough. Failure to read it is not an excuse. And, Your Honor, we believe that, at a minimum, cases are dismissed pursuant to Rule 12(b)(6), that arbitration should be compelled.

And I will a pause, Your Honor, if you want my adversary to have a chance to respond or I can move on to the 12(b)(6) motion. Your choice, Your Honor.

THE COURT: That's a good idea. Why don't we pause and let plaintiffs respond to the arbitration issue? So why don't you stand by?

MR. SHEEHAN: Thank you. Sheehan, Spencer for the plaintiff.

Thank you, my colleague or my adversary, either. I appreciate your words about the arbitration.

Anyway, Your Honor, much of what my adversary says is

factually true with respect to the layout of the screens and the prompts and the click-throughs. Although, of course, plaintiff disagrees with the legal analysis.

So specifically, as noted in the complaint, plaintiff has alleged that in order to read all of the terms of service and privacy policies of the one company, MoPub and its partners, it would be physically impossible to do because they would be logged out of the Grindr application, and that is sort of an impossibility, I guess, the exception that would render the arbitration clause unenforceable. That's the most obvious or at least the most significant argument.

There are public policy issues, as my adversary noted, at least that about with respect to which information Grindr discloses, but that information is not essential, per se, to adjudication of this motion to compel arbitration. Perhaps it imposes a higher standard on Grindr. I believe that it does.

But the main issue here, the most compelling against this motion to compel arbitration is that it is impossible to comply with all of the linked agreements because the app will time out, and they will have to go through it again. They will never be able to get through all of the application or through the terms of service and also read all of the linked terms of services.

So that is the most important and most significant argument. I could, you know, tell cases where the courts maybe

have not gone along with arbitration agreements. There was a First Circuit decision. That's in the First Circuit, but any -- you know, case that I tell Your Honor, Your Honor is going to make your decision based on your understanding of the law and facts, and there are issues with respect to the Android phones versus the Apple phones that were mentioned in this complaint, but those aren't really central to this issue.

The issue is based on impossibility of compliance with the arbitration clause in the agreement, and I don't think defendant has refuted that point. Although, I'm sure that defendant may choose to point out something about it now, and that's fine, but in the interest of being brief, I think that's the main point the plaintiff will make.

THE COURT: Okay. All right. Thank you very much.

Is there a defense reply to that?

MR. SIACHOS: Very brief, Your Honor. This is Peter Siachos speaking.

The plaintiff seems to think that if he wanted to read all of the other terms and conditions, that he has to do so within a prescribed period of time, and that if somehow the Grindr app won't stay on that long, then he is out of luck. But there is nothing preventing the plaintiff from going to read all of the other terms and conditions and going back to Grindr and hitting "I accept the terms of service." And whether he did read them or not -- we don't know that at this point, it doesn't

really matter -- the user, the plaintiff, the class representative, he clicked a link or he clicked a box that said that he has read, understood and agreed to be bound by the terms of the agreement.

And then after that, that's, Your Honor, in the declaration of Rodolfo Elizondo, which is docket 11, Exhibit 1. And after that, the terms of service say, if you do not agree to this agreement, then please cease using the Grindr services immediately. He agreed to it, whether he read it or not. We cite the cases in our brief, Your Honor. Doesn't matter. He agreed to it. The impossibility that -- even if you want to take their allegations as being true -- the impossibility of his ability to read everything before the Grindr app logs him out, well, then go back and log in again. But it's just not plausible, Your Honor.

So we think it's clear that arbitration does apply here. There is a presumability of arbitration under the FAA and the case law, and we hope that Your Honor will compel arbitration.

THE COURT: All right. Anything else from plaintiff's standpoint on this issue?

MR. SHEEHAN: One final point, Sheehan, Spencer for the plaintiff. Yes, Siachos makes a good point about, yes, the plaintiff could presumably log out and then log back in. However, because of the numerous terms of service policies and

their possibility of, you know, that all of them, you know, may not be identical at the same time the plaintiff would choose to log in, plaintiff submits that it's an obstacle to informed compliance and supports the impossibility of the plaintiff's compliance. So that's all.

THE COURT: Okay. All right. Anything else from the defense standpoint?

MR. SIACHOS: Very briefly. Peter Siachos here.

There is one term of service that matters here, and it's Grindr's terms of service. It's attached to the -- at docket 6, at 6-1 and 6-2. It's the only one that matters.

Whether, you know, if the plaintiff wants to go read another one and doesn't agree to them, I don't know what that has to do with anything; but he agreed to the one term of service that matters, the one term of service that has the arbitration clause in it, and that's the end of the story.

THE COURT: All right. Anything else from plaintiff on this issue?

MR. SHEEHAN: No, Your Honor. Thank you.

THE COURT: Okay. So I will be honest. I actually think that the arbitration issue is fairly clean, and so I'm just going to go ahead and give you my ruling on that.

So the brief background here is that plaintiff filed the complaint against Grindr back in January of 2020. It's a class action on behalf of plaintiff and others who are alleged

users of the application on devices running Google's Android operating system who used the service allegedly under "the false impression regarding disclosure of their private information without their consent" in New York and 49 other states.

Plaintiff alleges violations of GBL Sections 349 and 350 for deceptive acts or practices and false advertising, respectively. Plaintiff also brings claims against defendant for violations of New York Civil Rights Law Section 51 and claims of trespass to chattels, intrusion upon seclusion, breach of contract, negligence and unjust enrichment. As I said, before the Court is the motion to compel arbitration or, in the alternative, to dismiss.

In terms of some of the more relevant factual allegations, relevant at least to the pending motion, so at paragraph 1 Grindr is described as "the world's largest social networking app for gay, bi, trans and queer people." And at paragraph 12 of the complaint alleges that plaintiffs and other users being "members of groups which have been discriminated against, have no other option in the marketplace" other than using Grindr since "real competitors do not exist."

The complaint also alleges that defendant has a unique role as a private company which has created a place where "users can feel comfortable with their sexual orientation without fear of discrimination or violence."

So the complaint describes that to monetize this app,

defendants partnered -- defendant partners with a supply-side platform, an SSP I will call it, to install software development kits on a user's app and phone. The app includes SDKs, the software development kits, for multiple advertising technology companies, most significantly is MoPub, which is owned and operated by Twitter.

Once the defendant's app is open, the SDK gathers data from a user's phone. Through MoPub, the user's identity can be determined, and MoPub packages and provides this data to advertisers, so-called the demand-side platforms, or DSPs. This is all laid out at paragraphs 7 and 8 of the complaint.

The DSPs add the data supplied by MoPub for their own profile of the user. The DSPs then engage in realtime bidding, and the winner displays ads to the user. That's from paragraphs 9 and 10.

Like many applications, the use of the defendant's app begins with a -- and I will put it in quotes -- "consent form," and a privacy policy. This is paragraph 11. The policy -- the privacy policy "only informs users of one of a dozen advertising partners, MoPub, and directs them to independently review only MoPub's privacy policy." Paragraph 13.

Defendant instructs its users to "read the policies of MoPub's more than 160 partners prior to indicating their consent." Paragraph 14.

Plaintiff alleges that it is "physically impossible to

read all of these privacy policies prior to indicating consent because defendant's app will close automatically within that time period making compliance impossible." Paragraph 15.

Plaintiff also alleges that plaintiff and other users are "unable to consent and make an informed choice about using defendant's app and are not informed defendant sells its most private and sensitive information." Paragraph 16.

Unlike on Apple iPhones, the setting to "opt out of interest based ads" on the Google Android phones are allegedly "difficult to engage and locate." That's paragraph 18.

And the plaintiff cites the 2016 report that talks about how less than 17 percent of consumers had actually used the setting, although 30 percent erroneously thought they had opted out." That's paragraph 19.

Settings on Android allows apps to continue to use advertising ID for purposes -- for other purposes when a user affirmatively opts out of personalized advertising, again, according to plaintiff. That's paragraph 20. But on Apple devices, this ability to opt out is unavailable. That's paragraph 21.

According to plaintiff, defendant "does not respect the choices of users who opt out of sharing those details through its own actions or through facilitating the actions of its advertising partners." Paragraph 23.

And according to plaintiff, there were a number of --

there is a wide variety, I should say, of personal and sensitive information that was disclosed and auctioned off to third parties without plaintiff's consent, including all types of personal information: Age, height, ethnicity, relationship status, personal information like HIV status, location data, email addresses, et cetera.

And because, according to plaintiff, defendant's services targeted toward groups which have been victims of hate crimes and discrimination, the nondisclosure or the disclosure practice shocks the conscience of the plaintiff and the proposed class. So the proposed class is made up of individuals who would have a reasonable expectation of privacy in personal chat messages with other users and the personal information that's described elsewhere in the complaint. That's roughly from paragraph 29 of the complaint.

Now, I think turning away from the complaint just for this one point here is the defense does provide images of how exactly the terms and conditions of service appear on the website, and there's specific imaging of Section 21, which is the arbitration provision.

So in terms of the legal analysis, starting with the standard of review, this is a question of arbitrability, that is, whether the parties have submitted this particular dispute to arbitration; and the question of arbitrability is "a term of art covering disputes about whether the parties are bound by a

given arbitration clause, as well as disagreements about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." That's from *Pincaro versus Glassdoor, Inc.*, 2017 Westlaw 4046317 at star 5. Quoting from the Supreme Court in *Howsam*, 537 U.S. at 84.

To answer this question, the Second Circuit instructs that lower courts are to follow a two-part test, which means first, whether the parties have entered into a valid agreement to arbitrate; and if so, second, whether the dispute at issue comes within the scope of the arbitration agreement. That's from *In Re: American Express Financial Advisors Securities Litigation*, 672 F.3d 113 at 128. That's from the Second Circuit in 2011.

"The law generally treats arbitrability as an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." That's from *NASDAQ OMX Group Inc. versus UBF Securities, LLC*, 770 F.3d 1010 at 1031. That's a Second Circuit decision, also quoting from *Howsam* at page 83.

Now, with respect to this question, "the proper inquiry is whether there is clear and unmistakable evidence from the arbitration agreement as construed by the relevant state law that the parties intended that the question of arbitrability shall be decided by the arbitrators." That's from *Bernstein Investment Research and Management, Inc. versus Schaffran*, 445 F.3d 121 at 125. If such evidence exists, then the Court shall

apply an arbitration clause or agreement to "all disputes within its scope unless...the validity challenge is to the [arbitration] clause itself or...the party disputes the formation of the contract." That's from *Doctor's Associates, Inc. versus Kirksey*, 2018 Westlaw 6061573 at star 4. It's a District of Connecticut decision.

"When...parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." That's *Contec Corp. versus Remote*. So I'm just -- I am just going with *Contec Corp.*, 398 F.3d 205 at 208, which is a Second Circuit decision from 2005.

Now, the Federal Arbitration Act, the FAA, provides that an arbitration agreement "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." That's from 9 U.S.C. Section 2.

The FAA "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." That's *Buckeye Check Cashing, Inc. versus Cardegna*, 546 U.S. 440 at 443. However, "the FAA does not require parties to arbitrate when they have not agreed to do so." That's *Nicosia versus Amazon.com, Inc.*, 834 F.3d 220 at 229. It's a Second Circuit decision from 2016.

Before determining who decides arbitrability, the Court has to determine the initial validity of the agreement to arbitrate. So -- and that doesn't seem to be disputed here, but I will just note that that's what the Supreme Court said in *Henry Schein*, 139 S.Ct. at 530.

So because arbitrability is a question for the Court, the Court turns to the contract formation as it relates to the validity of the arbitration clause. When "a party challenges the formation or execution of the contract, it is the Court's role to determine whether a contract exists." That's from *Nicosia versus Amazon*, 2017 Westlaw 10111078 at star 16, footnote 32. So, for example, courts have to resolve challenges to issues of a contract's formation and challenges "directed specifically to the validity of...delegation provisions themselves." That's *Doctor's Associates* at star 4. "In cases such as this, where the purported assent is largely passive, the contract-formation question will often turn on whether a reasonably prudent offeree would be on inquiry notice of the term at issue." That's from *Specht versus Netscape Communications Corp.*, 306 F.3d 17 at 27. That's the Second Circuit decision from 2002.

To be bound by an online contract, "an Internet user need not actually read the terms and conditions." That's from *Nicosia* at 232. Nor must the user "click on the hyperlink that makes them available." Also from *Nicosia* at 232. Instead, the

key inquiry is whether the user had notice of the existence of the terms.

So I think we all agree that the terms of service here is a -- is what's known as a "clickwrap agreement," which is not in dispute; and that's described, among other cases, *Register.com versus Verio, Inc.*, 356 F.3d 393 at 429.

All right. So the first question is the validity of the contract and thus the arbitration clause. So in order to use the defendant's app, the plaintiff had to agree to defendant's terms, which is the first -- which is the default first screen presented to a user when using the app. And the terms state that claims in this dispute "must be asserted individually in binding arbitration." Other language that's displayed to plaintiff before using the app include -- and this is off the first screen. It's displayed in all caps, and I am just going to read what it says in all caps, "READ [THE TERMS OF SERVICE] CAREFULLY. BY ACCESSING, DOWNLOADING, USING, PURCHASING AND/OR SUBSCRIBING TO THE GRINDR SERVICES, YOU ACKNOWLEDGE" -- and this is in bold -- "YOU ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTOOD AND AGREED TO BE BOUND BY THE TERMS OF THIS AGREEMENT. IF YOU DO NOT AGREE TO THIS AGREEMENT, THEN PLEASE CEASE USING THE GRINDR SERVICES IMMEDIATELY." And that's, as I said, in all caps.

And, actually, the bold is something I -- I take that back. The bold is not in there, but what is in there

unequivocally is that this first reading that displays on the full screen is all caps. So what I read to you is all caps.

Also, the screen says, "You and Grindr agree that any dispute that has arisen or may arise between us relating in any way to your use or access -- your use of or access to the Grindr services, any validity, interpretation, breach, enforcement or termination of this agreement or otherwise relating to Grindr in any way...will be resolved in accordance with the" -- and I will put in brackets -- "[the arbitration clause]" which is 21. So close the bracket.

It also says, "any covered dispute matter must be asserted individually in binding arbitration."

Then in all caps, "THE" -- and then I will just put in brackets "[arbitration clause] WILL...REQUIRE DISPUTES BETWEEN YOU AND US TO BE SUBMITTED TO BINDING AND FINAL ARBITRATION UNLESS YOU OPT OUT."

All caps. "BY AGREEING TO THIS AGREEMENT, YOU HEREBY IRREVOCABLY WAIVE ANY RIGHT YOU MAY HAVE (i) TO A COURT TRIAL," and then I will put in brackets, "[AND] TO PARTICIPATE AS A MEMBER OF A CLASS." And again, that is all caps.

So by downloading the app, plaintiff acknowledged that he "had read, understood, and agree[d] to be bound by" Grindr's terms of service, which clearly included the arbitration clause and class action waiver. But again, I'm just more focused on the arbitration clause.

The language, you know, it's a phrase that gets used a lot, "in plain English," but that's important here because it is plain English. There is no archaic legalese, and it is in plain language that the user was urged to read carefully the terms of service. And, in fact, to advance through the Grindr app, users, including plaintiff, affirmatively had to click the "proceed" button, which triggers a digital prompt offering a user a choice between cancel or accept. And there is no allegation here that plaintiff opted out of the arbitration clause or that he did not consent to the terms of service before he began to use the app.

So that's relevant here because the Second Circuit has made it abundantly clear that "an electronic click can suffice to signify the acceptance of a contract...as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement." That's *Meyer versus Uber Technologies, Inc.*, 868 F.3d 66 at 75, and that's a 2017 case, comfortably long after telephones were invented.

So as I said, here the language is clear. It's explicit. It's prominently placed on the screen. It's the very first screen. It is in all caps to bring to the user's attention all of the Grindr terms of service. And so, not surprisingly, district courts have routinely upheld these types of clickwrap agreements. You know, agreements which require the user to click on an "I agree" or, you know, "I consent" after

being presented with a terms of use, for the principal reason that the user has affirmatively assented to the terms of the agreement by clicking "I agree."

So among the cases -- I didn't give the full cite earlier -- but it's *Fteja*, 841 F. Supp. at 837.

So "while new commerce on the Internet has exposed courts to many new situations, it does not fundamentally change the principles of contract." That's *Register.com* at 403. "Mutual manifestation of assent" remains a touchstone of contract formation. The creation of a contract would rest on the manifestation of an agreement between the parties in accordance with state law principle. That's from *Specht* at pages 28 through 29. The Court finds here that there was a manifestation of an agreement between the parties, and there is a valid contract because plaintiff was clearly presented with Grindr's terms and clicked "proceed" and then "accept." And the agreement includes the arbitration clause.

And that finding includes the finding that the display and language in the terms of service gave plaintiff more than reasonable notice that by clicking "accept," the plaintiff manifested his assent to the terms, including the arbitration clause.

Now, similar results were found in *Meyer* at 868 F.3d at 75, and *Feldman* at 513 F.Supp.2d at 237, and under New York law "a party's failure to read or understand a contract that it

signs does not relieve it of its obligation to be bound by the contract." That's from *In re: Lehman Brothers, Inc.*, 478 B.R. 570 at 587, footnote 19.

Now, as plaintiff points out, courts look to whether the terms were obvious and whether such terms were called to the offeree's attention. That's from *Starke versus Squaretrade, Inc.*, 913 F.3d 279 at 288. Here, the Court finds that the terms were obvious and did call them to plaintiff's attention. When plaintiff created the account on defendant's app, Grindr's terms of service were presented to plaintiff in all caps as the first screen he viewed before being able to use the app, and with the requirement of clicking "accept" to Grindr's terms and conditions of service, which, as I said, include the arbitration clause.

Plaintiff was also presented with the option to cancel, but chose not to do so, and proceeded while on notice of Grindr's terms.

Now, plaintiff does argue at page 4 of his memorandum that defendant did not provide him with "easy access to the terms and conditions," but that's, frankly, a conclusory allegation that's belied by, as I said, the clear and obvious display of the terms on the very first screen presented to plaintiff.

You know, plaintiff also makes the argument at page 6 that no reasonable consumer would or could read all of these

policies, but that's not the inquiry. The inquiry is not whether the consumer actually read the terms, but instead whether they had notice of the existence of the terms; and by plaintiff's own acknowledgment in the complaint, plus with how all of this is presented and what the user has to do in terms of assenting, it's clear that plaintiff did have such notice.

So because the Court finds that Grindr's terms were, not only reasonably, but clearly communicated to plaintiff, and that plaintiff assented to such terms, the contract, which includes the arbitration clause, is valid.

So next is the issue of whether the dispute here falls within the scope of the arbitration clause. Now, federal policy in favor of arbitration "requires that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration." That's *Telenor Mobile Communications AS versus Storm, LLC*, 584 F.3d 396 at 406.

The first step in this inquiry is whether a dispute falls within the scope of an arbitration agreement is classifying it as broad or narrow. This is all spelled out in *Louis Dreyfus Negoce S.A. versus Blystad Shipping and Trading Inc.*, 252 F.3d 218 at 224.

"Broad clauses purport to refer all disputes to arbitration. Narrow clauses limit arbitration to specific types of disputes." That's a quote from *Camferdam v. Ernst & Young International, Inc.*, 2004 Westlaw 1124649 at star 1.

So if the agreement is narrow, the Court has to determine whether the issue is within the purview of that narrow arbitration clause; and of course if the agreement is broad, then a presumption of arbitrability attaches, and "arbitration of even a collateral matter would be ordered if the claim alleged 'implicates issues of a contract construction or the parties' rights and obligations under it.'"

That's from a case -- I will just spell out the plaintiff's name -- *S-E-R-E-B-R-Y-A-K-O-B versus Golden Touch Transportation of New York, Inc.*, 2015 Westlaw 1359047 at star 14.

So the terms of service in 2018 and 2019 state, "You and Grindr agree that any dispute that has arisen or may arise between us relating in any way to your use of, or access to, the Grindr services, any validity, interpretation, breach, enforcement or termination of this agreement or otherwise relating to Grindr in any way defined as ('covered dispute matters') will be resolved in accordance with the provisions set forth in this Section 21." And 21 is the arbitration clause.

The arbitration clauses provide that the FAA governs and applies in "all covered dispute matters" and in "all cases" and that "any covered dispute matter must be asserted individually in binding arbitration."

So I don't think it's a stretch to say that this agreement is broad. It contains the very type of expansive

language that is consistent in broad arbitration clauses, and similar clauses have been found in many cases such as the *Louis Dreyfus* case I mentioned earlier at 225. I'll add another case, which is *ACE Capital Overseas, Limited versus Central United Life Insurance Company*, 307 F.3d 24 at 26, which had the sort of "any dispute" type of language.

So where a Court finds that an arbitration agreement is broad, it creates a presumption of arbitrability, as I mentioned, and that's in -- so here, the language I think clearly "evidences the parties' intent to have arbitration serve as the primary recourse for disputes connected" in this case to Grindr's terms of service. That's from *Louis Dreyfus* at 225.

And further, in using language such as "any dispute," the terms of use contain no words of limitation applicable to plaintiff's claim. Specifically, the arbitration clause here establishes that "any dispute" between plaintiff and defendant regarding plaintiff's use of the app, which involves the terms of service and/or "relating to Grindr in any way" is subject to arbitration.

And here, there are only two exceptions: Matters involving intellectual property rights, and relief from small claims court, and neither exception applies here.

In fact, Grindr even provides the user the opportunity to opt out of the agreement to arbitrate, but there is no allegation that that was done here.

Thus, in the Court's view, the plaintiff's claims fall within the scope of the very broad arbitration clause, and therefore have to be arbitrated on an individual basis. So for this reason, the motion to compel is granted. The motion to dismiss is denied without prejudice as moot given the ruling on the arbitration.

I will issue an order that basically says, for the reasons stated on the record, the motion to arbitrate is granted.

Is there anything else we can do for you all?

MR. SIACHOS: From defendant's standpoint, nothing further, Your Honor. Thank you.

MR. SHEEHAN: From the plaintiff's standpoint, obviously, nothing further, Your Honor. Thank you.

THE COURT: All right. Then enjoy the rest of the day, and please stay healthy, everybody. We are adjourned.

MR. SHEEHAN: Thank you, Your Honor.

MR. SIACHOS: Thank you, Your Honor.

(Time noted: 10:46 a.m.)